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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 WESTERN NATIONAL MUTUAL
8 INSURANCE COMPANY, and
9 WESTERN NATIONAL
10 ASSURANCE COMPANY,

11 Plaintiffs,

12 v.

13 GARY TREPANIER EXCAVATING,
14 LLC, a Washington limited liability
company,

15 Defendants.

NO: 1:19-CV-3172-TOR

ORDER GRANTING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT IN PART

16 BEFORE THE COURT is Plaintiffs Western National Mutual Insurance
17 Company and Western National Assurance Company's Motion for Summary
18 Judgment (ECF No. 6). Defendants Gary Trepanier Excavating, LLC, did not file
19 an opposition to the Motion for Summary Judgment. The Court has reviewed the
20 record and submitted briefing, and is fully informed. For the reasons discussed
below, the Motion for Summary Judgment (ECF No. 6) is **granted in part**.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
IN PART ~ 1

BACKGROUND

Plaintiffs Western National Mutual Insurance Company and Western National Assurance Company brought this action for declaratory judgment against its insureds, Defendants Gary Trepanier Excavating, LLC, (“GTE”) and Gary J. Trepanier (owner of GTE), seeking a determination that Plaintiffs do not have a duty to defend or indemnify GTE or Mr. Trepanier in a law suit filed against both. As discussed more below, Mr. Trepanier has since passed away, leaving GTE as the only named Defendant.

A. Underlying Lawsuit

Mr. Dezsi and Ms. Dunn filed the underlying suit against GTE and Mr. Trepanier on July 20, 2018, asserting the following claims:

- (1) wrongful withholding of wages (RCW 49.52.050);
- (2) payment below minimum wage (RCW 49.46.020);
- (3) wage payment act violations (RCW 49.48);
- (4) negligent misrepresentation;
- (5) negligence;
- (6) breach of contract;
- (7) promissory estoppel; and
- (8) unjust enrichment.

ECF No. 1-1 at 5. The suit involves two overarching issues: (1) alleged landlord liability arising from a sewage leak (and potentially a claim for wrongful eviction) and (2) alleged wage violations.

1 The alleged wage violations stem from Mr. Trepanier’s decision to withdraw
2 monthly rental payments from Mr. Dezsí’s pay as an employee of GTE. In short,
3 Mr. Dezsí, an employee of GTE, began renting a home owned by Mr. Trepanier on
4 June 1, 2007 for \$400.00 per month. ECF No. 1-1 at 4, ¶¶ 4.3-4.4. Instead of
5 having Mr. Dezsí pay Mr. Trepanier rent directly, Mr. Trepanier deducted the
6 amount due from Mr. Dezsí’s pay as an employee of GTE. ECF No. 1-1 at 4, ¶
7 4.4. This arrangement was “satisfactory” to Mr. Dezsí until sometime around
8 October of 2016, when the rental was impacted by a raw sewage leak—the central
9 event giving rise to the remaining claims. ECF No. 1-1 at 4, ¶ 4.5.

10 In October of 2016, “[t]he home located up the slope from Mr. Dezsí’s
11 residence, also owned by Mr. Trepanier . . . began leaking raw sewage [which
12 flowed] down the hill, and under the footings of the home where Mr. Dezsí and his
13 spouse reside.” ECF No. 1-1 at 4, ¶ 4.6. The sewage leak was caused by a tree
14 root system that infiltrated the septic drain field, resulting in complete saturation of
15 the drain field and the complained-of pooling of sewage. ECF No. 1-1 at 4, ¶ 4.9.
16 This allegedly caused Mr. Dezsí and Ms. Dunn health issues and other damages.
17 ECF No. 1-1 at 4, ¶ 4.7. Mr. Trepanier was notified several times of the issue, but
18 it was not resolved. ECF No. 1-1 at 4, ¶ 4.8. Instead, Mr. Trepanier served Mr.
19 Dezsí with a 20-day notice of eviction. ECF No. 1-1 at 5, ¶ 4.11.

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1 **B. Policies**

2 Mr. Trepanier and GTE had a Commercial Policy Package in place with
3 Western National since February 26, 2010. ECF No. 6 at 4. The Policy includes
4 Commercial General Liability Coverage (“CGL”) with an Employment Practices
5 Liability Insurance endorsement (“EPLI”). ECF No. 6 at 4.

6 The CGL policy includes “Coverage A” and “Coverage B”. Coverage A of
7 the CGL provides “that Western National will pay sums that the insured becomes
8 legally obligated to pay as damages because of ‘bodily injury’ or ‘property
9 damage’ caused by an ‘occurrence’ that takes place in the coverage territory and
10 occurs during the policy period.” ECF No. 6 at 5 (quoting policy); *see* ECF No. 8-
11 3 at 6. Coverage B of the CGL policy provides coverage for “personal and
12 advertising injury”. ECF No. 6 at 6; *see* ECF No. 8-3 at 11. The CGL policy
13 contains a Washington Changes – Employment-Related Practices Exclusion
14 endorsement that applies to Coverage A and Coverage B of the CGL and excludes
15 from coverage “bodily injury” and “personal and advertising injury” arising out of
16 “employment-related practices, policies, acts or omissions . . .” ECF No. 8-5 at 2.

17 The EPLI endorsement covers losses arising out of an insured’s “wrongful
18 employment act” against an employee. ECF No. 6 at 8; *see* ECF No. 8-6 at 15.
19 The EPLI endorsement contains an exclusion for all claims and suits “for
20 violation(s) of any . . . duties imposed by” the Fair Labor Standards Act or “similar

1 federal, state [or] local . . . statutory law or common law,” including any and all
2 claims that “allege, arise out of, are based upon, are attributable to, or are in any
3 way related to the refusal, failure, or inability to pay wages or to improper
4 deductions from pay taken by an insured from any employee.” ECF No. 8-6 at 8.

5 C. Procedure

6 Defendants sought coverage from Plaintiffs for the underlying lawsuit and
7 Plaintiffs initiated their defense with a reservation of rights. ECF No. 1 at 11, ¶ 48.
8 Soon thereafter, Plaintiffs filed this declaratory action seeking a determination that
9 they do not have a duty to defend Defendants in the underlying action or indemnify
10 Defendants for any resulting liability. ECF No. 1.

11 Plaintiffs filed the pending Motion for Summary Judgment on October 25,
12 2019, requesting the Court resolve the requests for declaratory judgment in their
13 favor. ECF No. 6. Mr. Trepanier subsequently passed away and the Plaintiffs
14 dismissed Mr. Trepanier from the action, leaving GTE as the sole defendant. *See*
15 ECF No. 11. GTE did not file an opposition to the Motion. The Motion is now
16 before the Court.

17 STANDARD OF REVIEW

18 A movant is entitled to summary judgment if he or she demonstrates “there is no
19 genuine dispute as to any material fact and that the movant is entitled to judgment as a
20 matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” if it might affect the

1 outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477
2 U.S. 242, 248 (1986). An issue is “genuine” where the evidence is such that a
3 reasonable jury could find in favor of the non-moving party. *Id.* The moving party
4 bears the “burden of establishing the nonexistence of a ‘genuine issue.’” *Celotex*
5 *Corp. v. Catrett*, 477 U.S. 317, 330 (1986). “This burden has two distinct components:
6 an initial burden of production, which shifts to the nonmoving party if satisfied by the
7 moving party; and an ultimate burden of persuasion, which always remains on the
8 moving party.” *Id.*

9 In deciding, only admissible evidence may be considered. *Orr v. Bank of*
10 *America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). Mere allegations or denials in the
11 pleadings are not enough. *Liberty Lobby*, 477 U.S. at 248. Further, “evidence of the
12 non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-
13 movant’s] favor.” *Id.* at 255. However, the “mere existence of a scintilla of evidence”
14 will not defeat summary judgment. *Id.* at 252. Per Rule 56(c), parties must support
15 assertions by “citing to particular parts of the record” or “showing that the materials
16 cited do not establish the absence or presence of a genuine dispute, or that an adverse
17 party cannot produce admissible evidence to support the fact.”

18 **DISCUSSION**

19 Plaintiffs assert they have no duty to defend or indemnify Mr. Trepanier and
20 GTE in the underlying lawsuit. “The duty to indemnify exists only if the insurance

1 policy actually covers the insured’s liability, whereas the duty to defend arises
2 when the policy could *conceivably* cover allegations in a complaint.” *Xia v.*
3 *ProBuilders Specialty Insurance Company*, 188 Wash. 2d 171, 182 (2017)
4 (emphasis in original).

5 The Court declines to address Plaintiffs’ arguments that relate to Mr.
6 Trepanier in his individual capacity – the claims related to the sewage leak and
7 (potentially) the eviction – because he has been dismissed and Plaintiffs have not
8 joined the estate of Mr. Trepanier. The request for a declaratory judgment related
9 to the sewage leak or eviction only implicate the interests of the estate of Mr.
10 Trepanier and the failure to include the estate would impede the estate’s ability to
11 protect its interests. *See* Fed. R. Civ. P. 19. As such, these claims must be
12 dismissed for failure to join a necessary party.

13 The only claims directly involving GTE are limited to the claims involving
14 the alleged wrongful withholding of Mr. Dezsi’s monthly payment for rent.
15 Plaintiffs argue there is no coverage for these claims because the complained-of act
16 is specifically excluded from coverage. The Court agrees.

17 First, there is no coverage under the CGL. The CGL policy specifically
18 excludes from coverage “bodily injury” and “personal and advertising injury”
19 arising out of “employment-related practices, policies, acts or omissions”
20 ECF No. 8-5 at 2. The complained-of withholding was an employment-related act,

1 as it occurred within the context of compensating Mr. Dezsi as an employee.

2 While the exclusion does not appear to apply to “property damage”, *see* ECF No.
3 8-5 at 2, the withholding of wages is not property damage.

4 Second, the EPLI endorsement covers losses arising out of an insured’s
5 “wrongful employment act” against an employee, but the definition does not
6 include failure to pay wages, the wrongful withholding of wages, or eviction
7 proceeding against an employee. ECF No. 6 at 8; *see* ECF No. 8-6 at 15. The
8 EPLI form also specifically excludes all claims and suits “for violation(s) of
9 any . . . duties imposed by” the Fair Labor Standards Act or “similar federal, state
10 [or] local . . . statutory law or common law,” including any and all claims that
11 “allege, arise out of, are based upon, are attributable to, or are in any way related to
12 the refusal, failure, or inability to pay wages or to improper deductions from pay
13 taken by an insured from any employee.” ECF No. 8-6 at 8. The claims related to
14 GTE improperly withholding the rental payment from Mr. Dezsi’s pay clearly fall
15 under the exclusion. Accordingly, the Court finds there is no coverage for the
16 wage-related issues. Plaintiffs are entitled to summary judgment on this issue.

17 In summary, Plaintiffs have demonstrated the wage-related conduct is not
18 covered by the relevant insurance policy so Plaintiffs have no duty to indemnify or
19 defend Defendant GTE with respect to the wage-related allegations.

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1 **ACCORDINGLY, IT IS HEREBY ORDERED:**


2 Plaintiffs Western National Mutual Insurance Company and Western
3 National Assurance Company's Motion for Summary Judgment (ECF No. 6) is
4 **GRANTED IN PART.** Plaintiffs have no duty to indemnify or defend Defendant
5 GTE with respect to the wage-related allegations.

6 The District Court Executive is directed to enter this Order, enter judgment
7 for Plaintiffs against Defendant Gary Trepanier Excavating, LLC, provide copies
8 to the parties and **close** the file.

9 DATED February 11, 2020.



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THOMAS O. RICE
Chief United States District Judge